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IN THE
COURT OF APPEALS OF INDIANA

JPMORGAN CHASE, N.A., Successor by Merger with JPMorgan, N.A.,	)	
Appellant-Plaintiff,	)	
and	)	
WASHINGTON MUTUAL, N.A.,	)	
Appellant-Defendant,	)	
vs.	)	No. 10A04-0608-CV-452
JOHN TAKACS, III, a/k/a JOHN TAKACS, BOBBI LYNN TAKACS, a/k/a BOBBI L. TAKACS, HELLER FIRST CAPITAL CORPORATION,	)	
Appellees-Defendants,	)	
and	)	

SUZANNE JULIUS and KMJ VII, LLC,	)
Appellees-Intervening Defendants.	)

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel F. Donahue, Judge
Cause No. 10C01-0406-MF-416

June 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

JPMorgan Chase, N.A. and Washington Mutual, N.A. (hereinafter "Washington Mutual") appeal the trial court's March 15, 2006 Order to Set Aside Default Judgment and its denial of the April 17, 2006 Motion to Correct Error. Washington Mutual argues the intervening defendants Suzanne Julius and KMJ VII (collectively, "Julius") did not have standing to challenge the foreclosure judgments and decrees, and the trial court erred by not holding a hearing on the March 15, 2006 Order.[1] The intervenors had standing, but the trial court erred when it ruled without a hearing. We must accordingly reverse and remand.

FACTS AND PROCEDURAL HISTORY

In August of 2000, John and Bobbi Lynn Takacs (collectively, "Takacs") entered into a mortgage agreement with Chase for real estate Takacs owned in Sellersburg. The mortgage was recorded August 29, 2000 and the original principal amount was $46,050.

[1] Because we remand for a hearing on the Julius motion, we do not address Washington Mutual's alternative arguments that Julius' T.R. 60(B) defense argument is flawed, Julius failed to demonstrate the Washington Mutual Entry was void as to them pursuant to T.R. 60(B), and Julius sought relief barred by the law of the case doctrine.

On April 22, 2002, Takacs executed a mortgage with Washington Mutual. It was recorded May 5, 2002 and the principal amount was $164,700. That same day, Chase and Washington Mutual recorded a Subordination of Mortgage whereby Chase subordinated the priority of its mortgage to Washington Mutual's security interest.

Takacs defaulted and on June 23, 2004, Chase brought a complaint to foreclose its mortgage. Chase named Washington Mutual and another lender, Heller, as defendants because they held mortgages on the same property. In August 2004, Washington Mutual answered the Chase complaint and filed a cross and counterclaim indicating it was in the first lien position because of a subordination agreement with Chase.

On September 13, 2004, the trial court granted Chase's motion for default judgment and foreclosure, which judgment stated Chase's mortgage was foreclosed subject to Washington Mutual's first mortgage lien.[2] Chase brought a Praecipe for Sheriff's Sale, which provided the property would be sold subject to Washington Mutual's mortgage lien, but the published Notice of Sheriff's Sale did not include that language. Rather, it said "the fee simple of the whole body" of the real estate was being sold.

On January 4, 2005, Julius bought the property at a sheriff's sale. She took title by a sheriff's deed recorded January 11, 2005. That deed provided the property was sold

[2] On January 25, 2005 the court entered a *Nunc Pro Tunc* Amended Judgment and Decree of Foreclosure that provided Chase was due $41,815.06 plus costs, its lien was superior to all others "except for the first and prior lien of [Washington Mutual]," and the property was to be sold at a sheriff's sale. (App. at 64.) The sheriff's sale proceeds were to be applied to the money owing to Washington Mutual, then to the Chase debt.

On April 18, 2005, Washington Mutual brought a Motion to Correct Disbursement Order, noting it was not entitled to sheriff's sale proceeds. The court entered an "Order Correcting Disbursement" that so held.

subject to the Washington Mutual lien. A little over a month later, Julius sold the property to KMJ VII, LLC.

On March 24, 2005, the trial court ruled on Washington Mutual's cross and counter claim in an "Agreed and Default Judgment Entry and Decree of Foreclosure" (App. at 67), which granted Washington Mutual an *in rem* judgment against the mortgaged property for $154,570.93 plus interest, costs, and attorneys fees. That judgment also foreclosed the mortgage, ordered a sheriff's sale, declared the Washington Mutual mortgage was a first priority lien, and ordered the proceeds from the sheriff's sale be paid to Washington Mutual before Chase or Heller.

Chase and Washington Mutual offered a "Stipulation to Set Aside Sheriff's Sale" in which they noted Julius had claimed she was unaware the property was being sold subject to Washington Mutual's first lien at the January, 2005 sheriff's sale. They asked the court to return Julius' money and schedule another sale. The court granted the order on August 16, 2005, but rescinded it the next day, noting Julius had invested money in improvements and had sold the property to another party who had no notice of any of the proceedings.

In October and November 2005, Washington Mutual moved to schedule a sheriff's sale. The court held a hearing in February 2006. It did not issue an order, but it permitted Julius and KMJ VII to intervene. Julius then moved, pursuant to Ind. Trial Rule 60, to set aside the foreclosure and to vacate all entries after the date of the sheriff's sale. The trial court granted the motion without a hearing, and denied Washington Mutual's subsequent motions to set aside that order and to correct error.

DISCUSSION AND DECISION

Ind. Trial Rule 60(B) provides in relevant part:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
>
> * * *
>
> (6) the judgment is void;
>
> (7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

The burden is on the moving party to establish grounds for relief. *Hoosier Health Sys., Inc. v. St. Francis Hosp. & Health Ctrs.*, 796 N.E.2d 383, 387 (Ind. Ct. App. 2003).

When reviewing the trial court's grant of a T.R. 60(B) motion, we apply an abuse of discretion standard. *Gifford v. Hartford Steam Boiler Inspection & Ins. Co.,* 811 N.E.2d 853, 856 (Ind. Ct. App. 2004), *trans. denied sub nom. Gifford v. Erickson*, 831 N.E.2d 734 (Ind. 2005). Abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id.* An action to foreclose a mortgage lien is essentially equitable in nature, and trial courts have considerable equitable discretion to set aside sales of property

resulting from their foreclosure judgments. *Centex Home Equity Corp. v. Robinson*, 776 N.E.2d 935, 942 (Ind. Ct. App. 2002), *trans. denied* 792 N.E.2d 38 (Ind. 2003). A trial court should not hesitate to exercise its equitable authority to set aside a sheriff's sale where there is a gross inadequacy of price or circumstances showing fraud, irregularity, or great unfairness. *Id*. When making this determination, the trial court will consider a variety of factors, including the price paid, the effect of procedural irregularities, evidence of mistake or misapprehension, the presence of inequitable conduct, and problems with title to the purchased property. *Id*. The trial court's decision in this regard is entitled to significant deference. *Id*.

1. Standing

Trial Rule 60(B) provides that a trial court may relieve "a party" from a final judgment. This generally means that one who is not a party to a judgment may not have that judgment set aside unless he intervenes in the action pursuant to Trial Rule 24. *Id*. Julius and KMJ VII moved to intervene in the foreclosure action on the grounds they had an interest in the subject real estate but had not been served with notice of the proceeding. Their motion was granted.

The grant or denial of a petition to intervene is within the discretion of the trial court, and we will reverse only if its decision is clearly against the logic and effect of the facts and circumstances before the court. *Hiles v. Null*, 716 N.E.2d 1003, 1004 (Ind. Ct. App. 1999). In reviewing the trial court's exercise of its discretion, the facts alleged in the motion to intervene must be taken as true. *Id*. A petition to intervene after a judgment is disfavored, but T.R. 24(C) explicitly permits intervention after a judgment

for purposes of a T.R. 60 motion. *Id*. A showing of extraordinary or unusual circumstances must be made to justify intervention after a judgment. *Id*.

Washington Mutual argues at some length that Julius lacked standing to challenge the foreclosure orders, but does not acknowledge the effect of the grant of the motion to intervene. Nor does Washington Mutual argue the motion to intervene was improperly granted. An intervenor is treated as if he were an original party and has equal standing with the original parties. *Panos v. Perchez*, 546 N.E.2d 1253, 1254 (Ind. Ct. App. 1989). We accordingly cannot find the trial court abused its discretion in granting the motion to intervene. As Julius became a "party" on the grant of that motion, she had standing.

2. Hearing Required

Washington Mutual argues the trial court erred by not holding a hearing in connection with the March 15, 2006 Order. We must agree. T.R. 60(D) explicitly provides: "In passing upon a motion allowed by subdivision (B) of this rule the court *shall hear any pertinent evidence*, allow new parties to be served with summons, *allow discovery*, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule." (Emphasis supplied.) *And see State ex rel. AAFCO Heating & Air Conditioning Co., Inc. v. Lake Superior Court, Room Two, at East Chicago*, 263 Ind. 233, 235, 328 N.E.2d 733, 734 (1975) ("if a motion under Rule T.R. 60(B) is made by a party[,] notice to the opposing party and a hearing thereon is required before an order may be issued"); *Hoosier Health Sys.*, 796 N.E.2d at 388 (in balancing the interests of the parties, T.R. 60(D) requires the trial court to hold a hearing at which parties may present pertinent evidence and permit discovery).

Julius argues no hearing on the T.R. 60(B) motion was necessary because "pertinent evidence" was presented during the February 6, 2006 hearing. She relies on *Pub. Serv. Comm'n v. Schaller*, 157 Ind. App. 125, 133-34, 299 N.E.2d 625, 630 (1973), where we held the hearing requirement in T.R. 60(D) is "restricted to 'pertinent evidence.' If therefore, there is no evidence which could be pertinent to the allegations of the motion because such allegations, even if true, would not warrant the relief sought, a hearing would be a futile proceeding." *Id*.

Julius has waived that argument on appeal. Julius asserts the trial court, at a February 6, 2006 hearing, "heard arguments as to why [Washington Mutual] should not be allowed to set a new Sheriff's Sale on the Julius owned real estate and why [Washington Mutual's] judgment and decree of foreclosure should be vacated." (Appellee's Br. at 10.) However, the record appears not to include a transcript of that hearing, nor does Julius direct us to anything else in the record to support that characterization of the arguments made at the hearing.[3]

A party waives an issue when he fails to provide adequate citation to authority and portions of the record. *Watson v. Auto Advisors, Inc*., 822 N.E.2d 1017, 1027 (Ind. Ct. App. 2005), *trans. denied* 831 N.E.2d 749 (Ind. 2005). *And see* Ind. Appellate Rule 46(A)(8) ("The argument must contain the contentions of the appellant on the issues presented supported by cogent reasoning. Each contention must be supported by citations to the . . . Appendix or parts of the Record on Appeal relied on.")

[3] In both her Statement of the Case and Statement of Facts Julius again characterizes the hearing as one where the court heard argument on all those matters, but she again offers no citation to the record in support of that characterization.

Despite the waiver, we cannot say a hearing on the 60(B) motion would have been "futile" on the ground all the same issues had been presented to the trial court at the prior hearing. The trial court's Order and Notice of Hearing that scheduled the February 6 hearing indicates only that the hearing was scheduled in response to Washington Mutual's motion for an order instructing the Clark County sheriff to schedule a sale of the real estate. In light of the silence of the record before us regarding the evidence presented at the prior hearing we cannot say the evidence presented there relieved the trial court of its obligation to hold a hearing and allow discovery on the motion granted by the March 15 order. We must accordingly reverse on that ground.

CONCLUSION

We reverse, vacate the March 15, 2006 Order, and remand for further proceedings consistent with this opinion.

Reversed and remanded.

NAJAM, J., and MATHIAS, J., concur.